No. S-1-SC-37231

# Supreme Court of the State of New Mexico

SUSAN L. SIEBERT,

*Plaintiff-Appellee,*

v.

REBECCA C. OKUN, M.D., AND
WOMEN'S SPECIALISTS OF NEW MEXICO, LTD.,

*Defendant-Appellant.*

On Appeal from the Second Judicial District Court, Bernalillo County
No. D-202-CV-2013-05878, Hon. Victor S. Lopez, Presiding

## BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AND NEW MEXICO TRIAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE


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*Romer v. Evans*, 517 U.S. 620 (1996) ....................................................................11

*S. Cal. Physicians Council Corp. v. Phoenix Ins. Co.*, No. C-35076,
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*Watts v. Lester E. Cox Med. Ctrs*, 376 S.W.3d 633 (Mo. 2012) ....................5, 9

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Medical Malpractice Act, NMSA 1978, Section 41-5-6 (1992) ....................1, 2

**OTHER AUTHORITIES**

24 ATLA L. Rep. 194 (1981) ....................18

"A Close Call," Forbes, Apr. 15, 1976 ....................24

American Medical Association, *Medical Liability Reform NOW!* (2018 ed.) ....................26

Annual Statement of St. Paul Fire and Marine Ins. Co., Schedule P (1985), in Best's Reproductions of Annual Statements -- Property Casualty (1986 ed.) ....................19

Jay Angoff, *Falling Claims and Rising Premiums in the Medical Malpractice Insurance Industry* (July 2005) ....................31

Jay Angoff, *Insurance v. Competition: How the McCarran-Ferguson Act Raises Prices and Profits in the Property-Casualty Insurance Industry*, 5 Yale J. on Reg. 397 (1988) ....................35

Tom Baker, *Medical Malpractice and the Insurance Underwriting Cycle*, 54 DePaul L. Rev. 393 (2005) .................... 23, 25

Tom Baker, The Medical Malpractice Myth (2005) .................... 14, 18, 20

A.M. Best, Best's Casualty Loss Reserve Development (1982 through 1986) ......20

Vasanthakumar N. Bhat, Medical Malpractice:
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Patricia H. Born & W. Kip Viscusi, *Damages Caps, Insurability, and the Performance of Medical Malpractice Insurance*,
Harvard Law & Economics Discussion Paper No. 467 (2004)...........................28

Patricia M. Danzon, *Frequency and Severity of Medical Malpractice Claims: New Evidence*, 49 Law & Contemp. Probs. (1986)............................................28

Patricia M. Danzon, Medical Malpractice: Theory, Evidence, and
Public Policy (1985) ......................................................................... 23, 24

William E. Encinosa & Fred J. Hellinger, *Have State Caps on Malpractice Awards Increased the Supply of Physicians?*, 24 Health Aff. 250 (2005)..........38

Mark A. Finkelstein, *California Civil Section 3333.2 Revisited: Has It Done Its Job?* 67 S. Cal. L. Rev. 1609 (1994).........................................34

Foundation for Taxpayer and Consumer Rights, *How Insurance Reform Lowered Doctors' Insurance Rates in California* (March 7, 2003) ....................34

Government Accountability Office,
*Financial Cycles in the Property/Casualty Industry* (1986)...............................22

Government Accountability Office, *Medical Malpractice: Implications of Rising Premiums on Access to Health Care*, GAO-03-836 (Aug. 2003) .......................40

Government Accountability Office, *Medical Malpractice: Six State Case Studies Show Claims and Insurance Costs Still Rise Despite Reforms*, GAO/HRD-87-21 (1986)........................................35

Government Accountability Office, *Profitability of the Medical Malpractice and General Liability Lines of Insurance* (1987) ..............................................20

Edith Guild Henderson, *The Background of the Seventh Amendment*,
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Robert Hunter & Joanne Doroshow, *Stable Losses/Unstable Rates 2016* (Americans for Insurance Reform 2016), https://www.insurance-reform.org ........ passim

Insurance Services Office, *Claim Evaluation Impact, National Overview* (1987)........ 34

Daniel P. Kessler & Mark B. McClellan, *Do Doctors Practice Defensive Medicine?*, 111 Q. J. of Econ. 353 (1996) ....... 37

Jonathan Klick & Thomas Stratmann, *Medical Malpractice Reform and Physicians in High-Risk Specialties*, 36 J. Legal Stud. S121 (June 2007) .......... 38

Todd M. Kossow, Fein v. Permanente Medical Group: *Future Trends in Damage Limitation Adjudication*, 80 Nw. U. L. Rev. 1643 (1986) ........ 34

Ruth L. Kovnat, *Medical Malpractice Legislation in New Mexico*, 7 N.M. L. Rev. 5 (1976-1977) ........ 13, 14, 15, 16

Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 Hastings L.J. 579 (1993)........ 3

*Medical Malpractice Insurance in New Mexico*, Report of J. Robert Hunter......... 21

David A. Matsa, *Does Malpractice Liability Keep the Doctor Away? Evidence from Tort Reform Damage Caps*, 36 J. Legal Stud. S143 (2007)........ 39

Robert B. McKay, *Rethinking the Tort Liability System: A Report from the ABA Action Commission*, 32 Vill. L. Rev. 1219 (1987)........ 24

Michelle M. Mello, *Medical Malpractice: Impact of the Crisis and Effect of State Tort Reforms*, Research Synthesis Rep. No. 10 (Robert Wood Johnson Found. 2006)........ 29, 39

Michelle M. Mello & Troyen A. Brennan, *Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform*, 80 Tex. L. Rev. 1595 (2002) .... 36

Michelle Mello *et al.*, *Changes in Physician Supply and Scope of Practice During a Malpractice Crisis: Evidence from Pennsylvania*, 26 Health Affairs 425 (2007)........ 39

National Association of Attorneys General Ad Hoc Committee on Insurance, *An Analysis of the Cause of the Current Crisis of Unavailability and Unaffordability of Liability Insurance* (May 1986)..........................................25

National Association of Insurance Commissioners, *Cycles and Crises in Property /Casualty Insurance: Causes and Implications for Public Policy* (1991)...........25

Office of Technology Assessment, *Impact of Legal Reforms on Medical Malpractice Costs* (1993) ....................................................................31

Glen O. Robinson, *The Medical Malpractice Crisis of the 1970's: A Retrospective*, 49 Law & Contemp. Probs. 5 (1986) .......................................14

Jerrald J. Roehl, *The Law of Medical Malpractice in New Mexico*, 3 N.M. L. Rev. 294 (1973)..........................................................................6, 15

Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 Colum. L. Rev. 142 (1991).......3

Seth A. Seabury *et al.*, *Medical Malpractice Reform: Noneconomic Damages Caps Reduced Payments by 15 Percent, With Varied Effects by Specialty*, 33 Health Affairs 2048 (2014)..........................................................................27

Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Caps*, 80 N.Y.U. L. Rev. 391 (2005) ...........................................30

Ronald Stewart, *Malpractice Risk and Cost are Significantly Reduced After Tort Reform*, 212 J. Am. Coll. Surg. 463 (2011) ................................................29

Edward W. Taylor & William G. Shields, *The Limitation on Recovery in Medical Negligence Cases in Virginia*, 16 U. Rich. L. Rev. 799 (1982)..... 18, 19

Andrew Tobias, The Invisible Bankers: Everything the Insurance Industry Never Wanted You to Know (1983)..................................................................19

U.S. Dep't of Health, Educ. & Welfare, *Medical Malpractice: Report of the Secretary's Commission on Medical Malpractice* (1973)..................................17

W. Kip Viscusi & Patricia Born, *Medical Malpractice Insurance in the Wake of Liability Reform*, 24 J. Legal Stud. 463 (1995) ..............................................32

Paul B. Weiss, *Reforming Tort Reform: Is There Substance to the Seventh Amendment?*, 38 Cath. U. L. Rev. 737 (1989) .....................................................9

Mary Ann Willis, *Limitation on Recovery of Damages in Medical Malpractice Cases: A Violation of Equal Protection?*, 54 U. Cin. L. Rev. 1329 (1986)........15

Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639 (1973) ........................................................................3

## INTRODUCTION/INTEREST OF AMICI CURIAE[1]

The American Association for Justice [AAJ] is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including in New Mexico.

The New Mexico Trial Lawyers Association [NMTLA] is a voluntary membership organization. Its general members spend the majority of their time actively engaged in trial practice on behalf of plaintiffs who are physically and/or economically injured. Throughout their history, AAJ and NMTLA have served as advocates of the right of all Americans to seek legal recourse for wrongful injury.

The Memorandum Opinion and Order of the District Court held that the cap on damages contained in the Medical Malpractice Act, NMSA 1978, Section 41-5-6, (1992), is unconstitutional, in violation of N.M. Const. Art II, § 12 which provides that "[t]he right to trial by jury as it has heretofore existed shall be secured to all and

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[1] No party has objected to the filing of this brief. No party or party's counsel authored this brief in whole or in part. No person, other than amici curiae, their members, and their counsel, contributed money that was intended to fund the preparation or submission of this brief.

remain inviolate." (10 RP 2463-78). The district court also recognized the equal protection and due process challenges to the cap proffered by Appellee, but relied primarily of the jury right which it "found to be dispositive." (10 RP 2463). Appellants in their Brief in Chief [BIC] contend that the MMA cap does not violate the jury right, [BIC 17-38], and that it does not violate either equal protection of the law or substantive due process. [*Id.* 40-54]. Appellants are supported by two amicus briefs—one by the New Mexico Hospital Association, which addresses equal protection and due process, and the other by the New Mexico and American Medical Societies in support of their asserted values underlying the cap on damages.

This single amici brief in support of Appellee challenges the historical and underlying data of the defense amici, urging that this Court affirm the judgment of the district court below.

## ARGUMENT

### I. THE MMA DAMAGES CAP VIOLATES THE FUNDAMENTAL CONSTITUTIONAL RIGHT OF WRONGFULLY INJURED PLAINTIFFS TO A JURY DETERMINATION OF DAMAGES.

AAJ and NMTLA respectfully urge this Court to uphold the district court's ruling in this case. The limitation imposed on non-medical damages by New Mexico's Medical Malpractice Act [MMA], NMSA 1978, Section 41-5-6 (1992), violates the right to trial by jury guaranteed to litigants like Susan Siebert by Article II, Section 12 of the New Mexico Constitution.

### A. The MMA Cap on Damages Violates the Right to Trial by Jury Guaranteed by the New Mexico Constitution.

Few principles of the common law are as firmly rooted and widely embraced in America as the right to trial by jury. Denial of this fundamental right to the colonists was a primary grievance against the King, ultimately leading them to break free of England. Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 Hastings L.J. 579, 595-97 (1993); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 654 (1973). Ratification of the new nation's Constitution was won only when its supporters acceded to broad popular demand that the right to trial by jury in civil suits be included in a bill of rights. *See generally* Wolfram, at 667-73; Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 295-99 (1966); Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 Colum. L. Rev. 142, 156-60 (1991).

The Supreme Court of the United States has repeatedly emphasized that "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) (quoted in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959); and *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*,

494 U.S. 558, 565 (1990)). *See also Bailey v. Cent. Vermont Ry.*, 319 U.S. 350, 354 (1943) ("The right to trial by jury is a basic and fundamental feature of our system of federal jurisprudence.") (internal quotation marks and citation omitted). Reflecting its fundamental importance, the right to trial by jury is guaranteed in nearly every state constitution.

Article II, Section 12 of the New Mexico Constitution provides: "The right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate." This Court has explained that this constitutional guarantee "continues the right to jury trial in that class of cases in which it existed either at common law *or by statute* at the time of the adoption of the Constitution . . . and in that class of cases where the right to a trial by jury existed prior to the Constitution, *it cannot be denied by the legislature*. *State ex rel. Bliss v. Greenwood*, 1957-NMSC-071, ¶ 15, 63 N.M. 156, 315 P.2d 223 (second emphasis added).

When the legislature has arbitrarily limited plaintiff's recoverable damages irrespective of the evidence, the Florida Supreme Court has stated the plaintiff is not "receiving the constitutional benefit of a jury trial as we have heretofore understood that right." *Smith v. Dep't of Ins.*, 507 So. 2d 1080, 1088-89 (Fla. 1987). Other state supreme courts have agreed that statutory limits on noneconomic damages deprive litigants of their state constitutional right to trial by jury. *See Lucas v. United States*, 757 S.W.2d 687, 690-92 (Tex. 1988) (cap on noneconomic damages in malpractice

actions violates both the jury right and access to the courts); *Kansas Malpractice Victims Coal. v. Bell*, 757 P.2d 251, 250 (Kan. 1988) (a damage cap "is an infringement on the jury's determination of the facts, and, thus, is an infringement on the right to a jury trial"); *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 717 (Wash. 1989) (the determination of noneconomic damages is "primarily and peculiarly within the province of the jury"); *Moore v. Mobile Infirmary Ass'n*, 592 So.2d 156, 163 (Ala. 1991) (where "the trial judge is required summarily to disregard the jury's assessment of the amount of noneconomic loss" the right to trial by jury has not been preserved "inviolate" as constitutionally mandated); *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218, 221-24 (Ga. 2010) (cap on noneconomic damages in medical malpractice actions contravenes the state's "inviolate" jury right); *Watts v. Lester E. Cox Med. Ctrs*, 376 S.W.3d 633, 640 (Mo. 2012) (The constitutional "right to trial by jury cannot 'remain inviolate' when an injured party is deprived of the jury's constitutionally assigned role of determining damages according to the particular facts of the case.").

### B. New Mexico's Right to Trial By Jury Applies to Medical Malpractice Actions, Whether Brought Under Common Law or Statute.

Appellant argues that the constitutional jury right does not apply to the MMA because it is a statutory cause of action enacted after 1911. [BIC 12-13]. This stingy interpretation fails to honor the constitutional guarantee.

The U.S. Supreme Court has emphasized that the Seventh Amendment right to trial by jury "applies not only to common-law causes of action, but also to 'actions brought to enforce statutory rights that are *analogous to* common-law causes of action.'" *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348 (1998) (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989)) (emphasis added).[2]

Similarly, this Court has held that Article II, Section 12 applies to "that class of cases in which [the right to a jury trial] existed either at *common law or by statute at the time* of the adoption of our constitution." *State ex rel. Human Servs. Dep't v. Aguirre*, 1990-NMCA-083, ¶ 8, 110 N.M. 528, 797 P.2d 317 (citing *State ex rel. Bliss v. Greenwood*, 1957–NMSC–071, ¶ 15, 63 N.M. 156, 315 P.2d 223).

Beyond dispute, the actions seeking money damages for harm caused by medical negligence were well-established under the common law prior to 1911. *See generally* Jerrald J. Roehl, *The Law of Medical Malpractice in New Mexico*, 3 N.M. L. Rev. 294 (1973). New Mexico adopted the common law by statute. *See Farmers' State Bank of Texhoma, Okl. v. Clayton Nat. Bank*, 1925-NMSC-026, ¶ 17, 31 N.M. 344, 245 P. 543 (citing Section 1345, C.L. 1915)).

[2] United States "Supreme Court decisions interpreting the Seventh Amendment [are] relevant to our discussion of [the] right to a jury trial under the New Mexico Constitution." *Bd. of Educ. of Carlsbad Mun. Sch. v. Harrell*, 1994-NMSC-096, ¶34, 118 N.M. 470, 882 P.2d 511.

### C. Plaintiffs in Medical Malpractice Actions Are Entitled to Have the Jury Determine Recoverable Damages.

Appellant also contends that that the MMA cap on damages does not infringe on a New Mexico litigant's right to trial by jury because under New Mexico law, the jury right encompasses only a jury's determination of "true issues of fact," not the full measure of damages if the legislature has restricted that remedy. [BIC 19].

In support, Appellant quotes from the opinion of the North Dakota Supreme Court: "the damage cap . . . does not preclude a jury from determining facts, including whether and to what extent a claimant was injured; rather, the damage cap limits the scope of recovery." [BIC 20 (citing *Larimore Pub. Sch. Dist. No. 44 v. Aamodt*, 908 N.W.2d 442, 454 (N.D. 2018))]. But Appellant's ellipsis conceals a crucial phrase: "in actions against political subdivisions." The quoted text is followed by citations to cases brought against governmental bodies. *Larimore*, 908 N.W.2d at 454.

The right to trial by jury is not violated in such cases because suits against the government were unknown to the common law. The legislature, in creating the right of action, was within its authority to limit the remedy. By contrast, when New Mexico became a state medical malpractice suits were well-established at common law, and are therefore subject to the guarantee of a jury determination of damages under Article II, Section 12. Appellant's reliance on *Wachocki v. Bernalillo Cty. Sheriff's Dep't*, 2010-NMCA-021, 147 N.M. 720, 228 P.3d 504, where the court of

appeals "reject[ed] a jury-right challenge to the Tort Claims Act," [BIC 20], is similarly inapposite.

In Appellant's view, once the jury has made its findings regarding damages, its constitutional role is ended, [BIC 22], a position that fails to honor the constitutional pledge to preserve the right to trial by jury "inviolate."

As the U.S. Supreme Court has stated, "the common-law rule as it existed at the time of the adoption of the Constitution" was that "in cases where the amount of damages was uncertain[,] their assessment was a matter . . . peculiarly within the province of the jury." *Dimick*, 293 U.S. at 480 (internal quotation marks and citation omitted). A plaintiff is entitled "to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages. Both are questions of fact." *Id.* at 486. As Justice Thomas, writing for the Court more recently, stated, the "right to a jury trial includes the right to have a jury determine the *amount* of statutory damages." *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998); *see also id.* at 355 ("[I]f a party so demands, a jury must determine the *actual* amount of . . . damages" (emphasis added)). This Court has also referred to the New Mexico litigant's "constitutional right to have the question of damages tried by a jury." *Henderson v. Dreyfus*, 1919-NMSC-023, ¶ 9, 26 N.M. 541, 191 P. 442.

Appellant's contention that the legislature has simply restricted the remedy, [BIC 18], is wide of the mark. The damage cap restricts a constitutional right. The

right to have a jury determine damages was not subject to any legislative restriction not based on the evidence in the case. Indeed, prior to the mid-1970's, "no one ha[d] seriously suggested that assessment of the amount of a plaintiff's damages in a common law action is anything but a question for the jury or that plaintiffs should be required to forgo full compensation for their injuries for a public policy reason." Paul B. Weiss, *Reforming Tort Reform: Is There Substance to the Seventh Amendment?*, 38 Cath. U. L. Rev. 737, 748-49 (1989). The cap on damages, which requires the judge to disregard a portion of the jury-determined damages, is a new curtailment of the jury right that did not exist in 1911.

Chief Justice Richard B. Teitelman, holding that Missouri's cap on noneconomic damages violated that state's jury guarantee, explained:

> [T]he common law did not provide for legislative limits on the jury's assessment of civil damages, Missouri citizens retain their individual right to trial by jury subject only to judicial remittitur based on the evidence in the case.

*Watts*, 376 S.W.3d at 640. To hold otherwise would violate the constitutional command that the right to a jury trial "remain inviolate." *Id.* at 637-38.

Amici submit that to disregard the jury's damages findings in this case in favor of an arbitrary amount fixed by the legislature without regard to the evidence violates Susan Siebert's state constitutional right to a jury trial.

## II. THE MMA CAP ON DAMAGES DOES NOT MEET THE RATIONAL BASIS STANDARD.

The district court did not base its holding on equal protection, but suggested that equal protection "may also be implicated here." (10 RP 2468). Appellant and supporting amici argue at length that the damage cap satisfies the rational basis test. [BIC 42-54; Brief of New Mexico Hospital Association, Amicus Curiae (N.M. Hosp. Assn. Br) 10-19; Amici Curiae Brief of New Mexico Medical Society and American Medical Association (N.M. Med. Soc'y Br.) 26-27]. Upon examination, the cap cannot pass muster under even this deferential standard.[3]

### A. Rational Basis Review Inquires Whether the Legislature Had a Reasonable Basis to Expect Its Action to Achieve a Legitimate Governmental Purpose.

The rational basis test requires the opponent of legislation to show that "the law lacks a reasonable relationship to a legitimate governmental purpose." *Marrujo v. N.M. State Highway Transp. Dep't*, 1994-NMSC-116, ¶ 12, 118 N.M. 753, 887

[3] This Court has emphasized that the rational basis standard applies to economic and social statutes that "do not involve fundamental rights." *Marrujo v. N.M. State Highway Transp. Dep't*, 1994-NMSC-116, ¶12, 118 N.M. 753, 887 P.2d 747. "Challenged legislation garners strict scrutiny if it affects the exercise of a fundamental right." *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶16, 125 N.M. 721, 965 P.2d 305. The statute in this case directly affects the fundamental right to trial by jury explicitly guaranteed in the New Mexico Constitution. Accordingly, the appropriate standard of review should be strict scrutiny, requiring the proponent to meet a heavy burden of proving that the legislation "furthers a compelling state interest" and "do[es] not unnecessarily burden constitutionally protected interests." *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 263 (1974).

P.2d 747. While highly deferential to the legislature's policy choices, the test requires the court to determine not only that the objective of the statute was legitimate, but also that the legislature "rationally could have believed that the provisions would promote that objective." *Kelo v. City of New London, Conn.*, 545 U.S. 469, 488 n.20 (2005). The court looks for "some relation between the classification and the purpose it served." *Romer v. Evans*, 517 U.S. 620, 632-33 (1996). The factual basis for the legislature's belief that the statute will achieve its legitimate purpose "must be something more than the exercise of a strained imagination; while the connection between means and ends need not be precise, it, at the least, must have some objective basis." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 442 (1982) (Blackmun, J., concurring).

The U.S Supreme Court has not hesitated to strike down state statutes that could not reasonably be expected to achieve their stated objectives or simply lacked any objective basis for such a belief. The Supreme Court's application of the rational basis test in *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), is instructive. *See Rodriguez v. Brand W. Dairy*, 2016-NMSC-029, ¶ 27, 378 P.3d 13 (stating "The New Mexico rational basis test is . . . similar to the federal heightened rational basis test" and citing *City of Cleburne*, 473 U.S. 432 (1985)). The Court in *City of Cleburne* employed rational relationship scrutiny to a zoning requirement that effectively barred a house for the handicapped from a residential location. The

municipality advanced several legitimate governmental purposes for the restriction, including prevention of crowding, fire protection, and proximity to a school. However, the Court found that under the circumstances that existed, there was no rational basis for the council to believe that the restriction would serve its stated purposes. *City of Cleburne*, 473 U.S. at 450.

Indeed, the U.S. Supreme Court has repeatedly inquired into the fit between statutory means and ends. *See, e.g.*, *Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612, 619 (1985) (property tax break for Vietnam veterans who were longtime New Mexico residents "cannot plausibly encourage veterans to move to the State," and, as a practical matter, might have discouraged some); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) (striking down a tax preference for in-state insurers, since the manner in which insurers actually operate made it irrational to believe that it would foster domestic companies); *Plyler v. Doe*, 457 U.S. 202, 229-30 (1982) (striking down Texas law denying free public education to undocumented children where the Court found no "credible supporting evidence" that this would be effective in dealing with the problem of illegal immigration).

This Court has stated that New Mexico's formulation of the rational basis test is "similar to" the U.S. Supreme Court's application in *City of Cleburne*. *Rodriguez v. Brand W. Dairy*, 2016-NMSC-029, ¶ 29, 378 P.3d 13. This Court held that an act of the legislature fails the rational basis test where the challenger can "demonstrate

that the classification created by the legislation is not supported by a firm legal rationale or evidence in the record." *Id.* ¶ 28 (quoting *Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 24, 137 N.M. 734, 114 P.3d 1050) (internal quotation marks omitted).

### B. The New Mexico Legislature Had No Basis to Reasonably Believe that the MMA Cap on Damages Would Make Liability Insurance More Available for New Mexico Doctors and Hospitals.

#### 1. *The New Mexico Legislature had no rational basis to believe the MMA cap on damages would attract insurers to New Mexico.*

"In 1976, the Legislature of New Mexico enacted the Medical Malpractice Act and the Professional Liability Fund Act in response to a widely-held perception that a medical malpractice crisis existed in the state." Ruth L. Kovnat, *Medical Malpractice Legislation in New Mexico*, 7 N.M. L. Rev. 5, 7 (1976-1977). Its expressed purpose was is "to promote the health and welfare of the people of New Mexico by making available professional liability insurance for health care providers in New Mexico." NMSA 1978, Section 41-5-2 (1976). The legislature took this action specifically in response to "the announced withdrawal of the insurance company underwriting the medical society's professional liability program in which ninety percent of medical practitioners and health care institutions participated." *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 16, 309 P.3d 1047, 1051 (quoting *Otero v.*

*Zouhar*, 1984-NMCA-054, ¶ 15, 102 N.M. 493, 697 P.2d 493, which quote referred to Travelers Insurance Companies [Travelers]).

The U.S. has experienced three major "crises" in recent years affecting the medical malpractice insurance market, occurring approximately in 1975-76, 1984-86, and 2002-04. J. Robert Hunter & Joanne Doroshow, *Stable Losses/Unstable Rates 2016* 5-12 (Americans for Insurance Reform 2016), https://www.insurance-reform.org [Stable Losses]; Tom Baker, The Medical Malpractice Myth 3 (2005). Each crisis was accompanied by lobbying campaigns in state legislatures seeking special protections, including, very prominently, limits on the amount of damages that could be recovered by plaintiffs whose claims were otherwise meritorious and supported by the evidence. The assumption was that the cap would "decrease losses and therefore make writing of professional liability insurance more attractive to the insurance industry." Kovnat, at 26.

The perceived crisis of the mid-1970's is particularly problematical due to the dearth of reliable information then available to lawmakers. The medical malpractice insurance industry embarked on a nationwide campaign that succeeded in winning changes in state medical malpractice law from many state legislatures. *See generally* Glen O. Robinson, *The Medical Malpractice Crisis of the 1970's: A Retrospective*, 49 Law & Contemp. Probs. 5 (1986); Mary Ann Willis, *Limitation on Recovery of Damages in Medical Malpractice Cases: A Violation of Equal Protection?*, 54 U.

Cin. L. Rev. 1329, 1329-31 (1986). But much of the information relating to the nature and root causes of the tumult in the medical malpractice insurance markets was hidden away in the files of the medical malpractice insurers themselves. Consequently, when New Mexico lawmakers enacted the MMA, although they believed they were addressing a crisis, in fact they were legislating in the dark.

Indeed, there was no evidence for the legislators to believe that the civil justice system was causing a sharp rise in losses for malpractice insurers. As Professor Kovnat observed, New Mexico courts had not lowered the common law barriers to successful prosecution of malpractice claims. Kovnat, at 9-10. In fact, New Mexico's courts had consistently rejected nearly every pro-plaintiff liberalization of medical malpractice law urged upon them. *See generally* Roehl, 3 N.M. L. Rev. 294.

Nor did the New Mexico legislature have reason to believe that frequency and severity of claims, while increasing, were beyond the capacity of liability insurers in New Mexico to handle profitably. In fact, available information showed that "the experience of professional liability insurers in New Mexico based on the application of the common law of malpractice had not resulted in losses greater than the premium rate would bear." Kovnat, at 26. To the contrary, information submitted by the New Mexico Medical Society in connection with its 1975 request for a rate increase for Travelers demonstrated that for the three years 1971-73, malpractice premiums collected by the company far exceeded losses incurred, even when

estimated future losses were taken into account. Kovnat, at 26, n.123 & 124. Travelers assured the President of the Medical Society that the program insuring its members was a success. *Id.* at 26, n.124. The malpractice insurers of New Mexico were clearly not burdened by unsustainable losses due to escalating lawsuits, as their lobbyists claimed.

Nor was there a rational basis for the New Mexico legislature to believe that the damage cap would have a positive effect on the availability of malpractice insurance in New Mexico. Professor Kovnat notes that "the feasibility study for a physician-owned mutual professional liability insurance company . . . refused to evaluate the impact of [damages] limiting legislation." Kovnat 26-27. As well, the "prospectus of the New Mexico Physicians Mutual Liability Company indicated that . . . the effect of the legislation on professional liability insurers was unknown. *Id.* at 27.

Professor Kovnat correctly concluded that, "with a dearth of information available about the true actuarial impact of the legislation a strong argument can be made that its classifications are arbitrary." Kovnat, at 27. Further, in the absence of any basis for believing that the cap would "induce the writing of professional liability insurance, it is irrational to deny those malpractice victims suffering losses above $500,000 their common law remedy." *Id.* at 28.

2. *There was no rational basis for the legislature to believe that the damage cap would stem insurance company "losses."*

The Hospital Association asserts that the damage cap meets its goal of attracting and retaining insurers to write malpractice coverage in New Mexico because "claim severity was the dominant factor in the increasing losses experienced by insurers." [N.M. Hosp. Assn. Br. 16 (citing U.S. Dep't of Health, Educ. & Welfare, *Medical Malpractice: Report of the Secretary's Commission on Medical Malpractice* 511 (1973) (HEW Report))]. The HEW Report, one of the few authorities offered by Appellant and its supporting amici from the mid-1970's, expressly found that "malpractice insurance is currently available to health-care practitioners under group plans and the market for such insurance is competitive." HEW Report, at XX. Moreover, among the Commission's numerous and far-reaching recommendations was no suggestion of limiting the amount of recoverable damages. The Hospital Association also erroneously asserts that damage limitations are "far and away . . . the most consistently influential reform in terms of affecting losses." [N.M. Hosp. Assn. Br. 20 (citing Tr. (5/31/17) 57)].

Insurance industry lobbyists in the mid-1970's converged on statehouses all across the country to urge lawmakers to limit the rights of victims because insurance companies were suffering unsustainable losses due to malpractice lawsuits, which would cause coverage to become unaffordable and even unavailable. St. Paul Fire and Marine, the nation's largest malpractice insurer in 1975, made this argument in

strong terms in its position paper "Preserving a Medical Malpractice Insurance Marketplace: Problems and Solutions," which it distributed to state legislators across the country. The paper described a growing crisis in which skyrocketing medical malpractice awards resulted in huge losses to insurers who would soon cease underwriting medical malpractice coverage altogether unless tort reforms, including caps on damages, were enacted. *See* Edward W. Taylor & William G. Shields, *The Limitation on Recovery in Medical Negligence Cases in Virginia*, 16 U. Rich. L. Rev. 799, 805-07 (1982). This was later termed the medical malpractice "myth." Baker, *The Medical Malpractice Myth*, at ch.1.[4]

However, "losses" in insurance-speak does not consist entirely, or even mostly, of payments made to liability claimants. They also include "losses" that are "incurred but not reported" [IBNR]. These are estimates of anticipated claims that will be paid in future years. Their estimated value is placed in reserves designated solely for the expected payouts and associated expenses. One highly significant fact that was not placed before legislatures deliberating damage caps in the 1970's, is

[4] In 1975, Travelers threatened to cease underwriting in California, citing huge losses, and obtained a 327% rate hike the following year. When an investigation revealed that the losses were nonexistent, 5,500 California doctors and policyholders brought suit. *See S. Cal. Physicians Council Corp. v. Phoenix Ins. Co.*, No. C-35076, Los Angeles County Super. Ct., No. C-35076 (settled Feb. 4, 1981). Travelers agreed to repay the doctors an estimated $50 million. *See* 24 ATLA L. Rep. 194 (1981); Taylor & Shields, at 811.

that these "losses" actually remained in the insurance company's own coffers. They are reserves that might never be paid out.

For example, St. Paul Fire & Marine, the nation's largest malpractice insurer at the time, collected almost $54 million in premiums from doctors nationwide in 1975, but paid out only $15.5 million in claims and expenses in that year. St. Paul designated $38 million as "reserves" for estimated future payments of claims covered by 1975 policies. St. Paul listed these reserves as "losses" and took tax deductions for them. But the money remained with St. Paul. *See* Taylor & Shields, at 829. St. Paul never paid close to $38 million in claims. By 1985, after paying virtually all claims arising out of 1975 occurrences, payments to victims, expenses, and attorney fees together amounted to only $28 million, leaving the company with $10 million that could be restated as profit. Similarly, in 1976, after raising premiums on doctors, St. Paul collected $104 million. Ten years later, it had paid only $29 million in claims, expenses, and fees for 1976. Annual Statement of St. Paul Fire and Marine Ins. Co., Schedule P (1985), in Best's Reproductions of Annual Statements -- Property Casualty 1395 (1986 ed.). The "underwriting losses" about which the company complained so bitterly when seeking legislative protections, were in reality huge profits. *See* Andrew Tobias, The Invisible Bankers: Everything the Insurance Industry Never Wanted You to Know 57 (1983).

Nor was St. Paul unique in this respect. The medical malpractice industry as a whole during the mid- to late-1970's, including the "crisis" years, took in far more in premiums than it paid out in claims. Prior to 1975, insurers were not required to report financial information concerning medical malpractice coverage as a separate line of insurance. Information supplied by the malpractice insurers themselves shows that looking back eight years after collecting premiums, after disposing of nearly all claims, malpractice insurance companies showed healthy profits.

| Year | Premiums Earned (thousands) | Losses and Expenses Paid After 8 Years |
|---|---|---|
| 1975 | $ 622,254 | $500,353 |
| 1976 | 1,070,389 | 463,706 |
| 1977 | 1,127,230 | 535,162 |
| 1978 | 1,125,012 | 720,042 |
| 1979 | 1,120,091 | 860,753 |

A.M. Best, Best's Casualty Loss Reserve Development, Report 01 (1982 through 1986).

The Government Accountability Office estimated that from 1975 to 1985, the medical malpractice insurance industry did not suffer the $653 million "loss" that it claimed: It made a $2.2 billion profit. GAO, *Profitability of the Medical Malpractice and General Liability Lines of Insurance* 10 (1987), *available at* https://www.gao.gov/assets/110/101669.pdf. *See also* Baker, *The Medical Malpractice Myth*, at 45.

3. *The malpractice insurance underwriting cycle was the true cause of the "perceived" malpractice insurance crisis.*

When the first malpractice insurance crisis occurred in the mid-1970s, J. Robert Hunter held the post of Federal Insurance Administrator. Hunter was part of an interagency working group that was tasked to investigate whether the insurance industry's claimed "explosion" of medical malpractice claims was causing the huge and sudden jump in premiums that doctors were experiencing. *Medical Malpractice Insurance in New Mexico*, Report of J. Robert Hunter, at 1 (Plaintiff's Exhibit 10). The findings of this investigation and others that followed are in many ways the heart of the constitutional challenge in this case. Damage caps have no rational basis if they are misdirected at limiting tort victims' rights and do not address the true cause of crisis.

What investigators found is that the civil justice system was operating as it should, compensating those wrongfully harmed by negligent health care providers. The cause of the insurance crisis turned out to be the medical malpractice insurance market itself. Much of the harm that the insurance industry has inflicted on health care providers involved those peculiar "losses" that were actually manipulated in pursuit of investment profits. Stable Losses, at 16.

Insurance companies are not only risk underwriters; they are also investment companies. They invest dollars collected in premiums until they are required to pay claims. This investment income is particularly important in the medical malpractice

line, where covered claims may take several years before they become payable. Investment income can spell the difference between a break-even year and a highly profitable one. Stable Losses, at 2-4.

Property-casualty underwriters, including malpractice insurers, track the business cycle in the general economy, which alternates between rising and falling rates of return on investment. Government Accountability Office, *Financial Cycles in the Property/Casualty Industry* (1986) (While frequency and severity of claims have followed a steady trend, the liability industry has experienced periodic "crises," followed by periods of competitive price cutting.).

When rates of return are high (usually reflected in rising interest rates and/or stock market values), insurance companies seek assets to invest. A medical malpractice insurer may reduce premiums in a competitive market to gain market share, even if the underwriting risk may not be actuarially sound. A second source of dollars to invest is to reduce reserves dedicated to paying future claims, IBNR, hoping that any shortfall may be covered by the anticipated investment gains. See Stable Losses, at 3.

The Florida Supreme Court, finding Florida's damage cap invalid, quoted the Florida Governor's Select Task Force on Healthcare Professional Liability Insurance, which in turn referred to the conclusions of Joanne Doroshow, Executive Director of the Center for Justice and Democracy and co-author of Stable Losses:

> [T]his so-called “crisis” is nothing more than the underwriting cycle of the insurance industry, and driven by the same factors that caused the “crises” in the 1970s and 1980s. According to . . . Doroshow, with each crisis, there has been a severe drop in the investment income for insurers, which has been compounded by sever [sic] under-pricing of insurance premiums in the prior years. . . . [D]uring years of high interest rates or excellent insurer profits that are invested for maximum return, the insurance companies engage in fierce competition for premium dollars by selling under-priced premiums and insuring very poor risks. Then . . . when investment income drops, either due to increases in interest rates or the stock market, or due to low income resulting from unbearably low premiums, the insurance industry responds by sharply increasing premiums and reducing coverage.

*Estate of McCall v. United States*, 134 So. 3d 894, 907-08 (Fla. 2014).

In 1973-74, the stock market, in which insurers had invested heavily, plummeted. The property-casualty industry as a whole sustained massive capital losses that dwarfed their underwriting losses. Patricia M. Danzon, Medical Malpractice: Theory, Evidence, and Public Policy 103 (1985). Professor Danzon explained that the “failure of premiums to keep pace” with claims was not due to excessive claims, but “appears to be better explained by competitive pressures on rates” by insurers competing for premium dollars. *Id.* at 112.

Thus, the “insurance underwriting cycle is an insurance industry specific business cycle that consists of alternating periods in which insurance is priced below cost (a ‘soft’ market) and periods in which insurance is priced above cost (a ‘hard’ market).” Tom Baker, *Medical Malpractice and the Insurance Underwriting Cycle*, 54 DePaul L. Rev. 393, 396 (2005). Poor planning by insurers and the failure of state

regulators to devise means of addressing this problem are also widely held responsible for the severity of the crisis. *See* Danzon, Medical Malpractice, at 112. What insurance companies told their policyholders and state legislators, however, was that undeserving victims of medical negligence and their lawyers were the cause.

As Forbes Magazine described it:

> What happened was this: It was normal practice for these companies to invest an amount equal to their legal surpluses in common stocks -- figuring if they could just break even on the underwriting, a rising stock market would give them a nice profit. This encouraged a rather greedy attitude: Why not shave rates to generate more premiums to invest in the market? Who needs underwriting profits when the stock market was certain to keep going up?

"A Close Call," Forbes, Apr. 15, 1976, at 30.

Other studies have traced the malpractice insurance "crisis" of the mid-1970's to this self-destructive behavior of the industry. A blue-ribbon commission assembled by the ABA concluded, "[I]n the medical malpractice 'crisis' of the mid-1970s, the insurance companies were receiving low returns on their investments while payments for medical malpractice claims were increasing rapidly." Robert B. McKay, *Rethinking the Tort Liability System: A Report from the ABA Action Commission*, 32 Vill. L. Rev. 1219, 1220 (1987). The National Association of Insurance Commissioners published the findings of its own investigation, concluding similarly that the poor planning and regulation of the property/casualty

insurance market, not the tort system, was responsible for the industry's cyclical "crises." National Association of Insurance Commissioners, *Cycles and Crises in Property/Casualty Insurance: Causes and Implications for Public Policy* (1991), *available at* http://www.naic.org/documents/prod_serv_special_cyc_pb.pdf; *see also* National Association of Attorneys General Ad Hoc Committee on Insurance, *An Analysis of the Cause of the Current Crisis of Unavailability and Unaffordability of Liability Insurance* (May 1986) (Plaintiff's Exhibit 31) (the "crisis" was not caused by the tort system, but by irresponsible pricing in pursuit of premium dollars to invest, and recurrence would not be averted by enacting tort reforms); Tom Baker, *Medical Malpractice and the Insurance Underwriting Cycle*, at 394 ("Litigation behavior and malpractice claim payments did not change in any significant, systemic sense between 1970 and 1975 . . . What changed, instead, were insurance market conditions and the investment and cost projections that the insurance market built into medical malpractice insurance premiums.").

Amici submit that the New Mexico legislature in 1976 lacked any factual basis for believing that its cap on damages would achieve its stated governmental objective. Not only was there no factual basis for believing that insurers were suffering genuine unsustainable losses, but lawmakers had no basis for believing that limiting tort recoveries would address the actual cause of the "crisis."

## III. STUDIES OFFERED BY APPELLANT'S SUPPORTING AMICI DO NOT PROVIDE A RATIONAL BASIS FOR THE CAP ON DAMAGES.

### A. Many of the Studies Relied Upon Do Not Establish the Propositions Advanced by Amici.

Amici New Mexico Hospital Association and New Mexico Medical Society attempt to provide a rational basis for the MMA cap by asserting new purposes that were never mentioned by the legislature: Reducing malpractice premiums, reducing defensive medicine, and increasing the supply of physicians practicing in New Mexico. These might well be worthwhile goals for the legislature to pursue with taxpayer dollars, after informed deliberations, but "it is irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice." *Morris v. Savoy*, 576 N.E.2d 765, 771 (Ohio 1991) (citation omitted).

The studies proffered to show that caps can accomplish these goals are not compellingly persuasive. Some are simply advocacy pieces that do no more than restate lobbying positions. For example, the Medical Society relies heavily on an AMA booklet, *Medical Liability Reform NOW!*, which describes its purpose as providing "medical liability reform (MLR) advocates with the information they need to advocate for and defend MLR legislation." American Medical Association, *Medical Liability Reform NOW!* (2018 ed.); *see also* [N.M. Med. Soc'y Br. 10, 12, 14]. Similarly, among the researchers cited on the impact of caps on insurer losses,

the Medical Society includes Mark Behrens, who is counsel to the American Tort Reform Association.

Other studies are unreliable because they attempt to draw inferences from information taken from states that have far different damage limitations than New Mexico's. The Medical Society states that New Mexico's cap is "unique" among state tort reforms. [N.M. Med. Society Br. 2.] Obviously the impact of a $250,000 limit on noneconomic damages, such as California's, will be far different than a much higher cap.

For example, the Hospital Association cites a study by Seabury in support of the proposition that damage caps exert a substantial downward shift in insurance company losses. [N.M. Hosp. Assn. Br. 23]. What that study actually found was a substantial reduction in award size in states that have a stringent $250,000 cap on noneconomic damages, while the reduction associated with a $500,000 cap on noneconomic damages "was not [statistically] significant." Seth A. Seabury *et al.*, *Medical Malpractice Reform: Noneconomic Damages Caps Reduced Payments by 15 Percent, With Varied Effects by Specialty*, 33 Health Affairs 2048, 2051 (2014). The Hospital Association also relies heavily on Professor Danzon's work to show that caps reduce the cost of claims. [N.M. Hosp. Assn. Br. 15-16]. However, Professor Danzon's study looked only at the impact of the $250,000 cap in

California. *See* Patricia M. Danzon, *Frequency and Severity of Medical Malpractice Claims: New Evidence*, 49 Law & Contemp. Probs. 57 (1986).

Those states that have put in place patient compensation funds cannot be assumed to have the same marketplace effects as states that have caps alone. For that reason, studies reflecting the experiences of other states tell us little about whether there existed a rational basis for New Mexico's legislature to reasonably believe its damages cap would have the same result in this state. The Hospital Association cites W. Kip Viscusi & Patricia Born, *Medical Malpractice Insurance in the Wake of Liability Reform*, 24 J. Legal Stud. 463 (1995), to support their contention that damage caps reduce insurer losses. [N.M. Hosp. Assn. 23]. However, those researchers subsequently reported that states which enacted damage caps in the mid-1970's (like New Mexico) and states that enacted patient compensation funds (like New Mexico) experience *no* reductions in insurer losses. Patricia H. Born & W. Kip Viscusi, *Damages Caps, Insurability, and the Performance of Medical Malpractice Insurance*, Harvard Law & Economics Discussion Paper No. 467, 15, 18, 32-33 (2004), *available at* https://lsr.nellco.org/harvard_olin/467.

Many of the proffered studies also suffer from poor methodology. According to the Robert Wood Johnson survey cited by the Medical Society [N.M. Med. Soc'y Br. 10], many are constructed to win the policy debate and "not based on rigorous analysis." Michelle M. Mello, *Medical Malpractice: Impact of the Crisis and Effect*

*of State Tort Reforms*, Research Synthesis Rep. No. 10, 9 (Robert Wood Johnson Found. 2006). Studies purporting to find lower premiums, less defensive medicine, or more doctors in states that enacted caps are simply examples of *post hoc, ergo propter hoc* – the logical fallacy that an event that follows another event must have been caused by the earlier event.

Other studies are simply too small or narrow to bear the weight of the broad assertions made for them. For example, the Medical Society relies in part upon Ronald Stewart, *Malpractice Risk and Cost are Significantly Reduced After Tort Reform*, 212 J. Am. Coll. Surg. 463 (2011), to prove that "[d]amage caps reduce losses on medical malpractice claims." [N.M. Med. Soc'y Br. 9-10]. The Stewart study looked at 98,513 general surgical procedures performed at a single medical center in Texas. *Id.* There were 25 lawsuits filed before tort reform and only three after, leading the author to conclude that the stringent package of tort reforms was effective. *Id.* There is no conclusion that can logically be applied to the impact of a different tort reform across the entire state of New Mexico for all medical treatments.

A more valid comparison, one apparently ignored by Appellant's supporting amici, is much more relevant and closer to home. Most New Mexico physicians have not chosen to be covered by the damages cap and are subject to liability under traditional common law principles. (10 RP 2467). Clearly, insurance against

uncapped damages recoverable at common law is both readily available and highly affordable.

### B. Caps Have Not Been Shown to Reduce Malpractice Insurance Premiums.

Appellant's amici assert that some studies show that medical malpractice insurance premiums are lower in states that have caps on damages, providing a rational basis for New Mexico's limit. [N.M. Hosp. Assn. Br. 20, 22; N.M. Med. Soc'y Br. Br. 10-11].

Lowering malpractice premiums was not an objective of the legislature in enacting the MMA. In fact, reducing premiums arguably conflicts with the legislature's stated purpose of attracting insurers to New Mexico by increasing profitability.

In any event, studies comparing insurance premiums in states with caps and without have come to hopelessly inconsistent and even contradictory conclusions. Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Caps*, 80 N.Y.U. L. Rev. 391, 408 (2005). The federal Office of Technology Assessment examined five leading studies in some detail. Two found lower malpractice premiums in cap states; two found no effect; and one concluded that cap states should see lower rates in the future. Office of Technology Assessment, *Impact of*

*Legal Reforms on Medical Malpractice Costs* 64-65 (1993), *available at* https://ota.fas.org/reports/9329.pdf.

Nor is it rational to assume that insurers would automatically lower the prices they charge providers for coverage simply because claims payments may be lower. Certainly the New Mexico statute does not require them to do so. Malpractice insurance companies are free to allocate any savings to profits, dividends to owners, investments, advertising, executive bonuses, or to their general operating budgets.

And in fact, direct evidence demonstrates that insurers tend to set premium prices to maximize profits under prevailing market conditions, independent of claims payments. For example, in a 2005 study of the 15 leading medical malpractice insurance companies, former Missouri Insurance Commissioner Jay Angoff found that between 2000 and 2004 the amount that insurers collected in premiums more than doubled, while their claims payments remained essentially flat. In fact, many insurers substantially increased their premiums while their claims payouts were decreasing. Jay Angoff, *Falling Claims and Rising Premiums in the Medical Malpractice Insurance Industry* 6-8 (July 2005), *available at* http://centerjd.org/system/files/ANGOFFReport.pdf.

Similarly, in 1989, Michael Hatch, then Commerce Commissioner of Minnesota, released the results of an investigation of two of the largest malpractice insurers in the country. Hatch found that during the prior six years, these companies

had increased doctors' malpractice premiums some 300 percent. Yet neither the number of claims against doctors nor the amount paid out by insurance companies had increased. *See* Stable Losses, at 10.

There was no reason for the New Mexico legislature in 1975 to have expected contrary results.

Even the research relied on by Appellant's amici do not support their argument. For example, the Hospital Association looks to W. Kip Viscusi & Patricia Born, *Medical Malpractice Insurance in the Wake of Liability Reform*, 24 J. Legal Stud. 463 (1995). [N.M. Hosp. Assn. 23]. That study found Wisconsin's cap on all damages and Michigan's $250,000 noneconomic cap resulted in a reduction in losses by insurers. Did loss reductions for insurers turn into premium reductions for doctors? Not according to Professors Viscusi and Born, who found that companies added those savings to their bottom lines to "enhance[] profitability." Viscusi & Born, *Medical Malpractice*, at 489-90.

Moreover, the relatively small studies offered by the defense are contradicted by more extensive empirical research. One such study figured prominently in the decision by the Florida Supreme Court to strike down that state's cap:

> Reports have failed to establish a direct correlation between damages caps and reduced malpractice premiums. Weiss Ratings, which evaluates the performance of the malpractice insurance industry, has detailed two particularly salient findings. First, based upon data acquired from 1991 until 2002, the median medical malpractice premiums paid by physicians in three high—risk specialties—internal

> medicine, general surgery, and obstetrics/gynecology—rose by 48.2 percent in states that have damages caps, but in states *without* caps, the median annual premium increased at a *slower* rate—by 35.9 percent. Martin D. Weiss, Melissa Gannon & Stephanie Eakins, *Medical Malpractice Caps: The Impact of Non–Economic Damage Caps on Physician Premiums, Claims Payout Levels, and Availability of Coverage*, at 7–8 (rev. ed. June 3, 2003), available at http://www.weissratings.com/pdf/malpractice.pdf. Second, the study noted that among states *with* caps on damages, only 10.5 percent (two of nineteen states with caps) experienced static or declining medical malpractice premium rates following the imposition of caps. In contrast, among states *without* damages caps, 18.7 percent (six of thirty-two states without caps) experienced static or declining medical malpractice premiums. *Id.* at 8.

*Estate of McCall*, 134 So. 3d at 910. *See also* Stable Losses, at 9 (summarizing a 1999 study by Americans for Insurance Reform entitled "Premium Deceit – the Failure of 'Tort Reform' to Cut Insurance Prices," and explaining that the study found that "[s]tates with little or no tort law restrictions experienced approximately the same changes in insurance rates as those states that enacted severe restrictions on victims' rights, confirming that insurance rate hikes were driven by factors having nothing to do with a state's tort system.").

In addition, the proposition that capping medical malpractice damages automatically results in lower malpractice premiums flies in the face of what malpractice insurers themselves actually say and do. For example, the industry's Insurance Services Office evaluated the effects of various tort reforms, including a $250,000 cap on noneconomic damages, on various liability situations. In general, the savings ranged from "marginal to nonexistent." Insurance Services Office, *Claim*

*Evaluation Impact, National Overview* 4 (1987). The cap on noneconomic damages resulted in no savings in most situations. *Id.* at 75. This study led the Ohio Supreme Court to conclude that Ohio's cap on noneconomic damages was arbitrary and irrational. *Morris*, 576 N.E.2d at 771. *See also Lucas v. United States*, 757 S.W.2d 687, 691 (Tex. 1988) (citing an independent study finding no relationship between insurance rates and the state's cap on damages).

Indeed, medical malpractice insurers have famously hiked their rates, sometimes drastically, soon after enactment of the stringent caps on damages they sought. In November 1975, only a few months after the California Assembly enacted MICRA's $250,000 cap, California's malpractice insurers levied huge premium increases of over 400%. Todd M. Kossow, Fein v. Permanente Medical Group: *Future Trends in Damage Limitation Adjudication*, 80 Nw. U. L. Rev. 1643, 1649 (1986). Premiums continued to rise sharply during the next decade. Mark A. Finkelstein, *California Civil Section 3333.2 Revisited: Has It Done Its Job?* 67 S. Cal. L. Rev. 1609, 1617-18 (1994). Rates stabilized only after the state enacted strict insurance regulation demanded by the voters in approving Proposition 103 in 1988. *See generally* Foundation for Taxpayer and Consumer Rights, *How Insurance Reform Lowered Doctors' Insurance Rates in California* (March 7, 2003), *available at* https://consumerwatchdog.org/report/how-insurance-reform-lowered-doctors-medical-malpractice-rates-california.

In 1987, the year after the Florida legislature enacted its $450,000 noneconomic damages cap, Florida's largest malpractice carriers filed for an increase in premiums. St. Paul Fire and Marine Insurance Co. submitted a formal statement to the Insurance Commissioner explaining that the increase was necessary because the $450,000 cap would not result any real savings for the insurer. Jay Angoff, *Insurance v. Competition: How the McCarran-Ferguson Act Raises Prices and Profits in the Property-Casualty Insurance Industry*, 5 Yale J. on Reg. 397, 400-01 (1988). *See also* Government Accountability Office, *Medical Malpractice: Six State Case Studies Show Claims and Insurance Costs Still Rise Despite Reforms*, GAO/HRD-87-21 (1986), *available at* https://www.gao.gov/assets/150/144921.pdf. As the Oklahoma Supreme Court stated, insurers "happily pay less out in tort-reform states while continuing to collect higher premiums from doctors and encouraging the public to blame the victim or attorney for bringing frivolous lawsuits." *Zeier v. Zimmer, Inc.*, 152 P.3d 861, 870 (Okla. 2006).

Caps on damages simply do not result in lower malpractice premiums for providers. There is no rational basis for New Mexico's lawmakers to have believed otherwise.

### C. Caps Do Not Reduce the Frequency of Claims or the Practice of Defensive Medicine.

The Medical Society amici assert that providers' "fear of being sued" leads to an increase in unnecessary medical care. [N.M. Med. Soc'y Br. 14] (citation

omitted). There is no definition of defensive medicine, though the Medical Society amici appear to view it as "hospital expenditures" that can be reduced "without substantial effects on mortality or medical complications." N.M. Med. Soc'y Br. 16 (quoting Donald J. Palmisano, *Health Care in Crisis: The Need for Medical Liability Reform*, 5 Yale J. Health Pol'y, L. & Ethics 371, 377 (2005)).

Indisputably, ordering additional tests, procedures, or consultations that have no medical purpose is bad medicine. However, the Medical Society amici's studies do not establish fear of lawsuits as the motivation. For example, the studies did not rule out the profit motive as a factor in increasing the practice of unnecessary medicine by doctors or hospitals. In fact, some have suggested that monetary incentives of providers play an important role in quantity of care. *See* Michelle M. Mello & Troyen A. Brennan, *Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform*, 80 Tex. L. Rev. 1595, 1607 (2002) ("It is likely that defensive medicine, to the extent that it ever took place, has diminished over time in response to the growing presence of managed care.").

The Medical Society amici also fail to explain how limiting the damages recoverable by the relatively few seriously injured patients would alter the amount of care a doctor gives to all patients. A study relied on by the Medical Society amici inquired into that issue. See [N.M Med. Soc'y Br. 17 (citing Daniel P. Kessler & Mark B. McClellan, *Do Doctors Practice Defensive Medicine?*, 111 Q. J. of Econ.

353 (1996))]. The researchers determined that a cap on damages is simply not the type of tort reform that is likely to reduce defensive medicine. Doctors are not motivated by the threat of large damage awards because "virtually all physicians are fully insured against the financial costs of malpractice, such as damages and legal defense expenses." Kessler & McClellan, at 354. Rather, physicians engage in defensive medicine "to avoid nonfinancial penalties, such as fear of reputational harm, decreased self-esteem from adverse publicity, and the time and unpleasantness of defending a claim." *Id.*

In other words, doctors practice defensive medicine because they do not want to be sued at all, not because they want to protect their malpractice insurance company from paying a large award. Thus, even if providers do engage in defensive medicine, they would be disincentivized to do so only by the type of tort that keeps them out of the courtroom altogether. There is no rational basis for New Mexico's lawmakers to believe that a damages cap would do so.

### D. Damage Caps Do Not Increase the Supply of Physicians Practicing in a State.

The third newly-minted objective for the MMA's damage cap is to attract and retain physicians to practice in New Mexico. [N.M. Med. Soc'y Br. 12]. This was not the express purpose of the MMA, nor did the legislature have any rational basis for believing the statute would accomplish such an objective.

The Medical Society amici cited several articles purporting to show, "States that limit noneconomic damages generally experience increases in physician supply per capita compared to states without caps." [N.M. Med. Soc'y Br. 12 (citing William E. Encinosa & Fred J. Hellinger, *Have State Caps on Malpractice Awards Increased the Supply of Physicians?*, 24 Health Aff. 250 (2005); and Jonathan Klick & Thomas Stratmann, *Medical Malpractice Reform and Physicians in High-Risk Specialties*, 36 J. Legal Stud. S121 (June 2007))].

In fact, even those studies fail to establish the Medical Society amici's point. The article by Encinosa and Hellinger specifically notes that that the slight effect on physician supply was limited to states that instituted caps in the mid-1980's. States that adopted damage caps in the mid-1970's, such as New Mexico, showed no such effect at all. Encinosa, at 253. Moreover, "caps with limits above $250,000 had no significant within-county effect on the overall supply and rural supply of surgical specialists and OB-GYNs." *Id.* at 255.

Klick and Stratmann acknowledge that "the effect of medical malpractice reform on physicians' location decisions is modest at best." Klick, at S121-22. Their conclusion was that "no reform has a consistently statistically significant effect on doctors' location decisions" *Id.* at S128.

The Hospital Association amicus makes the same claim that caps result in "a small but statistically significant increase in physician supply." N.M. Hosp. Assn.

Br. 21-22 (citing Michelle M. Mello, *Medical Malpractice: Impact of the Crisis and Effect of State Tort Reforms* 11 (2006); and David A. Matsa, *Does Malpractice Liability Keep the Doctor Away? Evidence from Tort Reform Damage Caps*, 36 J. Legal Stud. S143 (2007)).

In fact, Mello stated that "claims [of physicians relocating or reducing practice] have been supported more by anecdote than by hard data." Mello, *Medical Malpractice*, at 2. She has also noted that medical society and other surveys – "including [hers]" – reporting that doctors were planning to flee the state or restrict their scope of practice proved inaccurate and unreliable. Michelle Mello *et al.*, *Changes in Physician Supply and Scope of Practice During a Malpractice Crisis: Evidence from Pennsylvania,* 26 Health Affairs 425, 432-23 (2007), *available at* https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.26.3.w425.

Professor Matsa's research actually found that "malpractice caps do not increase physician supply for the average American," and an increase in the supply of specialists in extremely rural areas is attributable to the larger number of Medicaid patients in those areas. Matsa, at S145, S174-75. "My own analysis suggests that the adoption of caps is essentially unrelated to identifiable drivers of physician supply." *Id.* at S157. He concludes, "tort reform damage caps have no significant effect on most physicians' location decisions." *Id.* at S178.

The GAO has concluded that doctors do not appear to leave or enter states to practice based on caps on noneconomic damages in medical malpractice actions. Government Accountability Office, *Medical Malpractice: Implications of Rising Premiums on Access to Health Care*, GAO-03-836, at 6 (Aug. 2003), *available at* http://www.gao.gov/new.items/d03836.pdf. Extensive study of the supply of physicians in each state led Professor Bhat to conclude that "the medical malpractice system is not a significant factor in this supply." Vasanthakumar N. Bhat, Medical Malpractice: A Comprehensive Analysis 172 (2001).

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In sum, the goals of reducing malpractice premiums, reducing defensive medicine, and increasing the supply of physicians were not identified by the New Mexico legislature as goals of the Medical Malpractice Act. The empirical research and analysis offered by Appellant's supporting amici fail to demonstrate that the statute's cap on damages would accomplish any of these goals.

## CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court below.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to NMRA 12-318, I hereby certify that this brief complies with the type-volume limitation of NMRA 12-318(F)(3) because this brief contains 9,460 words, excluding the parts of the brief exempted by NMRA 12-318(F)(1). I further certify that this brief complies with the typeface and type style requirements of NMRA 12-305(C) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman type style.

Date: April 15, 2019

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## CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2019, I electronically filed the foregoing document through the Court's File and Serve system, which will cause service on all counsel of record in the matter listed below.

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